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No. 88-1668

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

ATLANTIC RICHFIELD COMPANY,
Petitioner,

v.

USA PETROLEUM COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AS AMICUS CURIAE

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Pursuant to Rule 42 of the Rules of this Court, the American Newspaper Publishers Association (ANPA) hereby moves this Court for leave to file a brief as *amicus curiae* in this case.

As set forth in the attached brief at pp. 1-2, the ANPA has a strong interest in the disposition of this case and believes that its perspective differs from that of any party. In its brief, the ANPA urges the Court to reverse the decision below and in that respect seeks the same re-

sult as the petitioner. The ANPA, however, also urges the Court to look beyond the grounds asserted by petitioner for reversal: The decision required by the antitrust standing rules casts doubt upon the underlying rule of *Albrecht v. Herald*, 390 U.S. 145 (1968), which found vertical maximum price agreements *per se* illegal. The ANPA brief demonstrates that the rationale behind *Albrecht* has been undermined by subsequent cases and by the experience of lower courts with vertical maximum price agreements. The brief also argues that such agreements are by their nature, purpose, and effect generally beneficial to consumer welfare. Thus, the ANPA urges the Court to reconsider its decision in *Albrecht* and to rule that vertical maximum price agreements should be judged under a rule of reason.

This motion and the attached brief are timely filed in accordance with Rule 36.3 of the Rules of this Court.

Respectfully submitted,

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BRIEF OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AS AMICUS CURIAE

INTEREST OF *AMICUS CURIAE*

Amicus, the American Newspaper Publishers Association ("ANPA"), is a non-profit corporation whose membership consists of some 1,400 newspapers constituting over ninety percent of the daily and Sunday newspaper circulation, and a substantial portion of the weekly newspaper circulation, in the United States. It submits this brief supporting reversal of the decision below, but on different grounds than urged by petitioner.

Until this Court's decision in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), it was common for daily newspapers

to sell copies at wholesale to independent distributors, who in turn resold and delivered the newspapers to subscribers. Because the lion's share of a publisher's revenue derives from advertising, and advertising revenues depend heavily on a newspaper's circulation, publishers attempted to maximize circulation by contracting with distributors to keep prices below specified levels. *Albrecht* made it *per se* unlawful for newspapers to set the maximum price at which their product could be resold. Most distributors who purchased newspapers for resale would have found it relatively easy to raise their prices and collect monopoly profits, with a commensurate reduction in circulation to the detriment of the publisher. Many publishers therefore were forced by *Albrecht* to change this method of distribution: They now sell their papers directly to subscribers at prices that they select, using either employees or independent agents for delivery, solicitation, and collection.

The newspaper industry thus presents the paradigm illustrating that the desire of a manufacturer to set price ceilings often serves, rather than restrains, competition and directly benefits consumers. The principal effect of the *Albrecht* prohibition in the newspaper industry has been to force publishers to sell directly to subscribers in order to ensure that distributors do not take advantage of their positions to raise retail prices. Were *Albrecht* overruled, publishers once again would be able to choose the most effective system of distribution, without the constraint of a legal rule that serves no sensible economic purpose.

ARGUMENT

The court below was in error in holding that respondent could suffer cognizable competitive injury because petitioner's alleged maximum price agreement with its dealers forced respondent to charge consumers lower prices. But this Court should not limit itself to reversing the judgment on the principal ground raised by the petition—lack of antitrust standing. If the Court did so, the only plaintiffs who could enforce the *Albrecht* prohibition against price ceilings would be dealers hoping to charge higher prices to consumers. To avoid this anomalous result, the Court should reexamine the merits of the *Albrecht* rule.

The fact of the matter is that, in the absence of predation, vertical maximum price agreements will almost always have procompetitive consequences—making more goods available to consumers at lower prices. This has nothing to do with the standing of the complaining party, but rather inheres in the substance of the alleged conduct. This Court should, therefore, overrule *Albrecht* and remove vertical agreements setting price ceilings from the category of restraints that are unlawful *per se* under the antitrust laws.

I. This Court Should Reconsider Its Ruling in *Albrecht* That Vertical Maximum Resale Price Agreements Are Unlawful *Per Se*.

The petition purports to present only a narrow question of antitrust standing: whether a distributor can sue for treble damages when a rival and the rival's supplier have agreed to a price ceiling. As shown in the petition, the answer to this narrow question is easy.[1] It would be untenable, however, for the Court to stop at

[1] In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), this Court ruled that an antitrust plaintiff must show that it suffered an anticompetitive harm of the type that the antitrust